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Entered on Docket  
April 25, 2016

Honorable Gregg W. Zive  
United States Bankruptcy Judge



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16 UNITED STATES BANKRUPTCY COURT  
17 DISTRICT OF NEVADA

18 \* \* \*

19 In re: Case No. BK-13-51237-GWZ  
20 Chapter 7  
21 PAUL A. MORABITO  
22 Debtor.  
23  
24 ORDER GRANTING TRUSTEE'S  
MOTION TO COMPEL ATTORNEYS  
TO TURN OVER OR DISCLOSE  
RECORDED INFORMATION TO  
THE TRUSTEE (11 U.S.C. § 542(e))

25 Hearing Date: 04/05/2016  
Hearing Time: 2:00 p.m.

26 /  
27 This matter came before the Court on the 5<sup>th</sup> day of April, 2016, on the Trustee's  
28 Motion to Compel Attorneys to Turn Over or Disclose Recorded Information to the

1 Trustee (11 U.S.C. § 542(e)) filed on February 3, 2016 (Docket No. 509) (the "Motion");  
 2 the following oppositions to the Motion were filed:

- 3       1. Objections to (1) Trustee's Motion to Turnover or Disclose  
         4 Recorded Information (Lippes) and (2) Trustee's Motion to  
         5 Turnover Recorded Information (Robison) filed by Edward Bayuk  
         6 ("Bayuk") and The Jackson Hole Trust Company, as Trustee of The  
         Meadow Farms Irrevocable Trust ("Jackson Hole") March 23, 2016  
         (Docket No. 578) (the "Bayuk Opposition"); and
- 7       2. Virsenet, LLC's Opposition to the Trustee's Motions to Compel  
         8 Attorneys to Turn Over or Disclose Recorded Information to the  
         9 Trustee (11 U.S.C. § 542(e)) (ECF Nos. 509, 510) filed by Virsenet,  
 10 LLC ("Virsenet") on March 24, 2016 (Docket No. 582) (the "Virsenet  
         Opposition");

11 collectively the "Oppositions"; the Trustee filed an Omnibus Reply In Support of Motions  
 12 to Compel on March 29, 2016 (Docket No. 587) (the "Reply"); it appearing from the  
 13 record that notice of the hearing on the Motion has been given as required by law;  
 14 appearances were made at the hearing as reflected on the record thereof; the Court  
 15 having considered the Motion and the exhibit attached thereto, the Oppositions and the  
 16 Reply as well as the presentations and arguments of counsel made at the hearing; the  
 17 Court finds and concludes that:

18       1. Although the Oppositions advance arguments in relation to a companion  
 19 motion filed by the Trustee (Docket No. 510), this Order addresses only the Motion  
 20 (Docket No. 509).

21       2. An involuntary petition commencing this case was filed on June 20, 2013  
 22 (the "Petition Date").

23       3. Pursuant to the Motion, the Trustee sought an order directing Lippes  
 24 Mathias Wexler Friedman, LLP, a Buffalo, NY, based law firm ("Lippes"), to turn over all  
 25 of its client files relating to its representation of the Debtor prior to the Petition Date in  
 26 connection with any of the following persons or entities under the authority of 11 U.S.C.  
 27 § 542(e):

1  
 2 VTS Communications, LLC Virsenet, LLC  
 3 **(Collectively referred to herein as the "Virsenet Files")**  
 4  
 5 Edward Bayuk The Meadow Farms Irrevocable Trust  
 6 Page Top, LLC USHF Cellular Communications  
 7 Shipcom, LLC Robert S. Block  
 8 The Robert S. Block Family Trust Rene Steigler III  
 9 Tim McEvoy Raymond Whiteman  
 10 Jacobs Holdings, LLC CD Holding Co., LLC  
 11 JJ/CD Capital, LLC Bank of America, N.A.  
 12 The Sefton Trust Sefton Trustees  
 13 The Arcadia Living Trust Salvatore Morabito  
 14 **(Collectively referred to herein as the "Lippes Files")**

15 4. Neither the Debtor nor Lippes opposed the Motion.  
 16 5. Bayuk, Jackson Hole and Virsenet were the only parties in interest that  
 17 opposed the Motion.  
 18 6. No party in interest, including, but not limited to, the Debtor, Lippes, Bayuk,  
 19 Jackson Hole and Virsenet filed a privilege log in which they identified documents in the  
 20 Virsenet Files or the Lippes Files that could be subject to a claim of privilege.

21 7. 11 USC § 542(e) provides that:

22       Subject to any applicable privilege, after notice and a hearing,  
 23 the court may order an attorney, accountant, or other person that holds  
 24 recorded information, including books, documents, records, and  
 25 papers, relating to the debtor's property or financial affairs, to turn over  
 26 or disclose such recorded information to the trustee.

27 8. The Virsenet Files and the Lippes Files are property of the Debtor's estate  
 28 under the authority of 11 U.S.C. § 541.

1       9. A person or entity that holds recorded information, including books,  
 2 documents, records, and papers, relating to the debtor's property or financial affairs  
 3 subject to turnover under the provisions of 11 U.S.C. § 542(e) may claim a privilege,  
 4 but any files or documents that are not subject to a claim of privilege must be turned  
 5 over to a trustee upon demand.

6       10. To the extent any recorded information, books, documents, records and  
 7 papers in the Virsenet Files or the Lippes Files are not subject to a claim of privilege,  
 8 they must be turned over to the Trustee.

9       11. The Debtor is the only person that has standing to claim his individual  
 10 attorney-client privilege with Lippes in relation to the Virsenet Files and the Lippes Files.  
 11 The Debtor did not oppose the Motion. Accordingly, to the extent any of the recorded  
 12 information, books, documents, records and papers in the Virsenet Files and the Lippes  
 13 Files could have been protected by an individual claim of attorney-client privilege  
 14 between the Debtor and Lippes, the claim is waived. The Debtor cannot waive a  
 15 privilege belonging to any other person or entity.

16       12. To the extent any recorded information, books, documents, records and  
 17 papers in the Virsenet Files and the Lippes Files may have been subject to an individual  
 18 claim of attorney-client privilege between the Debtor and Lippes, they must be turned  
 19 over to the Trustee.

20       13. In the Motion, the Trustee argued the attorney-client privilege between the  
 21 Debtor and Lippes never attached because of the crime-fraud exception to the attorney-  
 22 client privilege.

23       14. The Court is not making any findings or conclusions as to whether the  
 24 crime-fraud exception applies to any communications between Lippes and Virsenet,  
 25 Bayuk or Jackson Hole.

26       15. The Oppositions argued that any communications among the Debtor,  
 27 Virsenet, Bayuk, Jackson Hole and Lippes are protected by the joint defense privilege  
 28 or the common interest privilege (the "Common Interest Privilege").

1       16. No person or entity other than Virsenet, Bayuk or Jackson Hole has  
 2 asserted a claim of a Common Interest Privilege in this case relating to Lippes' pre-  
 3 petition representation of the Debtor.

4       17. To be eligible for protection under a Common Interest Privilege, the  
 5 communications sought to be protected must be shared with the attorney for the  
 6 community and all members of a community must share a common legal interest in the  
 7 shared communication. *In re Teleglobe Communications Corporation*, 493 F. 3d 345,  
 8 364 (3<sup>rd</sup> Cir. 2007).

10      18. A wide variety of circumstances are relevant to the determination of  
 11 whether two or more parties intend to create a joint-client relationship, but the keys to  
 12 deciding the scope of a joint representation are the parties' intentions and expectations.  
 13 *Id.* at 363 (citing *Sky Valley Ltd. P'ship v. ATX Sky Valley Ltd.*, 150 F.R.D. 648, 652-53  
 14 (N.D. Cal. 1993)).

16      19. Because no party provided the Court with a privilege log for any  
 17 communications that may be reflected in the Virsenet Files or the Lippes Files, it is not  
 18 possible for this Court to determine, at this time, whether a Common Interest Privilege  
 19 exists among the Debtor, Virsenet, Bayuk, Jackson Hole and Lippes.

20      20. Even if a Common Interest Privilege may exist, "the great caveat of the  
 21 joint-client privilege is that it only protects communications from compelled disclosure to  
 22 parties outside the joint representation. When former co-clients sue one another, the  
 23 default rule is that all communications made in the course of the joint representation are  
 24 discoverable." *In re Teleglobe Communications Corporation*, 493 F.3d 345, 366 (3<sup>rd</sup> Cir.  
 25 2007). Thus, when parties formerly under a joint-client privilege become adverse, the  
 26 privilege no longer applies to any of their communications. *In re Hotels Nevada, LLC* at  
 27 571-572 (quoting *Teleglobe USA Inc. v. BCE, Inc. (In re Teleglobe Comm'n Corp.)*, 493  
 28 F.3d 345, 366 (3d Cir. 2007). Except as provided herein the Court is not making any  
 findings regarding claims of common interest privilege.

1       21. At this time the Trustee is not adverse to Virsenet.

2       22. Because the Trustee is not adverse to Virsenet and Virsenet has the right  
3 to claim any applicable privilege in relation to its communications with Lippes subject to  
4 the Court's *in camera* review, Virsenet should be given an opportunity to review the  
5 Virsenet Files for privileged materials before they are delivered to the Trustee.

6       23. The Trustee is adverse to Bayuk and Jackson Hole.

7       24. By reason of the adversity as between the Trustee and Bayuk and the  
8 Trustee and Jackson Hole, any Common Interest Privilege that may have protected the  
9 communications among Lippes, the Debtor, Bayuk and Jackson Hole are discoverable  
10 by the Trustee who has stepped into the shoes of the Debtor.

11       25. The contents of legal files created during the course of a joint  
12 representation belong jointly to the clients with each having an undivided ownership  
13 interest in them. *In re Kaleidoscope, Inc.*, 15 B. R. 232, 244 (Bk. Ct. N. D. Ga., 1981).

14       26. In addition the findings and conclusions set forth above, the Court  
15 incorporates such additional findings and conclusions that were set forth on the record  
16 of the hearing in accordance with the provisions of FRCP 52 incorporated by FRBP 7052  
17 and 9014(c) the same as if they were set forth in their entirety herein.

18           Now, therefore, good cause appearing,

19           IT IS HEREBY ORDERED that:

20       A. The Motion is GRANTED as provided herein.

21       B. Within fourteen (14) days following the Trustee's service of this Order upon  
22 Lippes, it shall deliver the originals of all of the Lippes Files to the Trustee's counsel at  
23 the following address:

24                   John F. Murtha, Esq.  
25                   Woodburn and Wedge  
26                   6100 Neil Road, Suite 500  
27                   Reno, Nevada 89511

28 If Lippes desires to make copies of the Lippes Files before delivering them to the  
Trustee, it may do so at its expense.

1           C.     The Trustee shall advise Virsenet's counsel of the time and manner of  
 2 service of this Order upon Lippes. Within twenty-eight (28) days following the Trustee's  
 3 service of this Order upon Lippes, Virsenet may either make arrangements to review the  
 4 Virsenet Files or make copies of them, at Virsenet's expense, so that it may identify any  
 5 documents in the Virsenet Files that it believes are subject to its attorney-client privilege  
 6 with Lippes.

8           D.     If Virsenet believes any documents in the Virsenet Files are protected by  
 9 its attorney-client privilege with Lippes, it shall, within the twenty-eight (28) day period  
 10 set forth in Paragraph C, above, prepare a privilege log that shall identify:

- 11           1.     The attorney(s) and client(s) involved in the claimed privileged  
               communication;
- 12           2.     The nature of the document claimed to contain privileged  
               information;
- 13           3.     All persons or entities shown on the document to have received or  
               sent the document;
- 14           4.     All persons or entities known to have been furnished the documents  
               or informed of its substance;
- 15           5.     The subject matter of the claimed privileged communication;
- 16           6.     The date the document was generated, prepared or dated; and
- 17           7.     Any other information Virsenet wishes to include in the privilege log  
               that it believes may be helpful in establishing its privilege claims.

22           E.     At the conclusion of Virsenet's 28 day review period, it shall file its privilege  
 23 log with the Court and serve it upon Lippes, the Trustee, the Debtor, Bayuk and Jackson  
 24 Hole.

25           F.     As soon as Lippes receives the privilege log from Virsenet, it shall deliver  
 26 the originals of all of the recorded information, books, documents, records and papers  
 27 in the Virsenet Files that are not listed in Virsenet's privilege log to the Trustee's counsel.

1 at the address indicated in Paragraph A, above. If Lippes desires to make copies of the  
2 non-privileged documents in the Virsenet Files it may do so at its expense.

3 G. Within fourteen (14) days following the filing and service of the Virsenet  
4 privilege log, any party in interest may file a statement with the Court indicating whether  
5 any of the documents listed on the privilege log should or should not be declared to be  
6 privileged with specific reasons supporting their position.  
7

8 H. The Court, after reviewing the Virsenet privilege log and any objections  
9 thereto, may direct Virsenet to file any of the claimed privileged documents with the  
10 Court, under seal, for an *in camera* inspection.  
11

12 I. Regardless of whether the Court orders Virsenet to file any documents  
13 under seal or not, the Court shall enter an order listing all documents in the privilege log  
14 that may be withheld from delivery to the Trustee on the ground that they are privileged  
15 and all documents that must be delivered to the Trustee notwithstanding Virsenet's claim  
16 of privilege.  
17

18 J. Within seven (7) days after the Trustee's service of the Court's order  
19 identifying which documents in the Virsenet Files are protected by Virsenet's attorney-  
20 client privilege upon Lippes, Lippes shall deliver all of the original documents in the  
21 Virsenet Files found by the Court not to be protected by an attorney-client privilege to  
22 the Trustee's counsel at the address listed in Paragraph A, above. Lippes may, at its  
23 expense, make copies of the documents prior to delivery to the Trustee's counsel.  
24

25     ///  
26     ///  
27  
28

K. Should a document be inadvertently produced by any party that has a privilege for any reason it shall be returned to the party that inadvertently produced it and will not be used by the Trustee or any other party for any reason in the litigation.

Prepared by:

WOODBURN AND WEDGE  
John F. Murtha, Esq.,  
Attorneys for the Trustee  
William A. Leonard, Jr.

Approved/Disapproved this 19th day of April, 2016.

ROBISON, BELAUSTEGUI, SHARP & LOW

By /s/ Frank C. Gilmore, Esq.  
Frank C. Gilmore, Esq.  
Attorneys for Debtor

Approved/Disapproved this 19th day of April, 2016.

WALTER WILHELM BAUER

By /s/ Holly E. Estes, Esq.  
Holly E. Estes, Esq.  
Attorneys for Edward Bayuk and  
The Jackson Hole Trust Company

Approved/Disapproved this 19th day of April, 2016.

KAEMPFER CROWELL

By /s/ Janet L. Chubb, Esq.  
Janet L. Chubb, Esq.  
Attorneys for Virsenet, LLC

1  
2                   **ALTERNATIVE METHOD RE: RULE 9021**

3                   In accordance with Local Rule 9021, counsel submitting this document certifies as follows: (check  
4                   one):

5                   \_\_\_\_ The Court waived the requirements of approval under LR 9021.

6                   \_\_\_\_ X This is a chapter 7 or 13 case, and either with the motion, or at the hearing, I have  
7                   delivered a copy of the proposed order to all counsel who appeared at the hearing, any  
8                   unrepresented parties who appeared at the hearing, and each has approved or  
9                   disapproved the order, or failed to respond, as indicated below:

10                  Counsel who approved the order:

Frank C. Gilmore, Esq.  
Robison Belaustegui Sharp & Low  
71 Washington Street  
Reno, NV 89509

Janet L. Chubb, Esq.  
Kaempfer Crowell  
50 W. Liberty St. #700  
Reno, NV 89501

Holly E. Estes, Esq.  
Walter Wilhelm Bauer  
205 E. River Park Cir. #410  
Fresno, CA 93720

11                  Counsel who disapproved the order:

12                  Counsel who did not respond:

13                  \_\_\_\_ This is a chapter 9, 11 or 15 case, and I have delivered a copy of this proposed  
14                  order to all counsel who appeared at the hearing, any unrepresented parties who appeared  
15                  at the hearing, and each has approved or disapproved the order, or failed to respond, as  
16                  indicated below:

17                  Counsel who approved the order:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

18                  Counsel who disapproved the order:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

19                  Counsel who did not respond:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

20                  \_\_\_\_ I certify that there were no appearances or oppositions at the hearing.

21                  \_\_\_\_\_  
22                  \_\_\_\_\_  
23                  \_\_\_\_\_  
24                  \_\_\_\_\_  
25                  \_\_\_\_\_  
26                  \_\_\_\_\_  
27                  \_\_\_\_\_  
28                  \_\_\_\_\_  
                        John F. Murtha, Esq.

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